UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

Served: August 22, 1990

FAA Order No. 90-18

In the Matter of:	Docket No. CP89NE0036
CONTINENTAL AIRLINES, INC.	

DECISION AND ORDER

Respondent Continental Airlines, Inc. ("Respondent") has appealed from the oral initial decision[1/] issued by Administrative Law Judge Daniel M. Head at the conclusion of the hearing held in this case on November 3, 1989, in [2/] The law judge held that Respondent violated section 108.5(a)(1) of the Federal Aviation Regulations (FAR) (14 CFR 108.5(a)(1)),[3/] by failing to carry out a provision

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1/ A copy of the law judge's initial decision is attached.

2/ The entire hearing record was sealed in this matter. Portions of this decision have been redacted for security reasons, pursuant to 14 C.F.R. Part 191. All unredacted copies of this decision must be treated in a confidential manner. Unredacted copies of this decision may not be disseminated beyond the parties to this proceeding and those carriers bound by the SSP, all of whom have been given unredacted copies in addition to redacted copies.

3/ Section 108.5(a) of the FAR provides in pertinent part:

> Each certificate holder shall adopt and carry out a security program that meets the requirements of section 108.7 for each of the following scheduled or public charter passenger operations: (1) Each operation with an airplane having a passenger seating configuration of more than 60 seats.

of the Standard Security Program (SSP) which had been adopted by Respondent pursuant to that regulation. The law judge affirmed the $1000 civil penalty sought by Complainant.

In the complaint, the Federal Aviation Administration ("Complainant"), through its agency attorney, alleged that on July 30, 1988, at the

security checkpoint, Respondent's contract security screener failed to detect an FAA-approved test object (

) during a no-notice test conducted by the FAA. It was alleged that this failure constituted a violation of 14 C.F.R. §108.5(a) in that Respondent failed to carry out section XIII.D.1. of its security program. Under that provision, Respondent is required, through its employees, contractors and/or agents who perform screening functions, to detect each FAA-approved test object during each screening system operator test conducted by the FAA without notice. As a result, the complaint sought a $1000 civil penalty against Respondent.

On appeal, Respondent argues that the law judge's initial decision should be vacated and the case dismissed for the following reasons:

1. The FAA improperly separated this case from other "test object" cases which were initiated at the same time, in order to avoid the $50,000 jurisdictional limitation of section 905 of the Federal Aviation Act (49 U.S.C. App. §1475);

2. Many of the rules in the Rules of Practice in FAA Civil Penalty Actions in effect at the time of the hearing in this case (14 CFR Part 13, Part G), were contrary to section 905 of the Federal Aviation Act (49 U.S.C. App. §1475) and the Administrative Procedure Act, and denied Respondent due process and equal protection of law;

3. Respondent was denied an opportunity to develop a full and complete record on the issue of the separation of functions by agency personnel because Complainant refused to release information requested by Respondent in discovery and the law judge denied Respondent's motion to compel;

4. The Rules of Practice in FAA Civil Penalty Actions in effect at the time of the hearing in this case (14 C.F.R. Part 13, Subpart G), were improperly applied to this proceeding because the alleged violation at issue occurred prior to the effective date of those rules;

5. The SSP (the only document which requires detection of FAA-approved test objects) has no regulatory effect; therefore, Complainant had no authority to seek a civil penalty for an alleged violation of the SSP;

6. Complainant deliberately withheld relevant and material information during pre-hearing discovery, thereby denying Respondent an opportunity for a full hearing;

7. The FAA did not fully follow the testing procedures set forth in the SSP;

8. The FAA's policy of seeking a civil penalty for <u>every</u> failure to detect a test object is a standard of "perfection" which is arbitrary, capricious, and unreasonable, and;

9. The law judge's finding that Respondent failed to comply with its security program is not supported by a preponderance of the evidence.

Complainant, through its agency attorney, submits the following arguments in response:

1. Complainant did not prosecute this case separately to avoid the $50,000 jurisdictional limitation;

2. The procedural rules in Part 13 which Respondent specifically challenges in its brief do comply with the Administrative Procedure Act and the Federal Aviation Act;

3. Respondent was not prejudiced by the law judge's denial of Respondent's motion to compel discovery of information pertaining to the identity of agency personnel involved in the initiation of this case;

4. The Rules of Practice were properly applied to the instant proceedings;

5. Respondent's failure to carry out the provisions of its security program constitutes a violation of 14 C.F.R. §108.5(a)(1), which is properly subject to enforcement action;

6. The law judge properly found that Respondent was not prejudiced by Complainant's failure to produce a memorandum on sanctions;

7. The law judge reasonably interpreted the SSP as permitting testing of separate components of a screening checkpoint at separate times;

8. It is not unreasonable to require that air carriers subject to FAA testing detect all test objects, and;

9. The preponderance of the evidence supports the law judge's finding that Respondent violated 14 C.F.R. §108.5(a) by failing to detect an FAA-approved test object.

For the reasons discussed below, Respondent's appeal is denied, and the initial decision is affirmed.

Respondent's arguments regarding alleged improper prosecution of this case separately from others, alleged defects in the Rules of Practice, alleged improper denial of information regarding personnel involved in issuing the complaint, alleged improper retroactive application of the Rules of Practice, and the alleged unenforceability of provisions of the SSP (arguments 1-5), have already been addressed and found unavailing in a previous case. In the Matter of Continental Airlines, Inc., FAA Order No. 90-0012 (April 25, 1990) (hereinafter, "Continental I"). Accordingly, those arguments are again rejected. Although the applicable portions of Continental I are briefly summarized below, the full text of that decision should be consulted for further discussion of these issues.

1. Prosecution of this case separately from other similar cases.

There is no requirement that all cases involving alleged security regulation violations be consolidated in one civil penalty action merely because they have been initiated at or about the same time and involve the same air carrier. Continental I, at 4-5. Thus, even though the initial documents in this case (i.e., the Notice of Proposed Civil Penalty and complaint) might have been filed at the same time as similar documents in other cases involving Respondent's alleged failure to detect test objects at various airports on various dates, it was not improper for Complainant to prosecute those cases separately.[4/]

2. Alleged deficiencies in the Rules of Procedure.

As in Continental I, Respondent attacks the procedural rules which were in effect at the time of the hearing in this case without demonstrating how it was prejudiced by any of those rules. Accordingly, the argument fails to provide any basis for overturning the law judge's decision in this case.

4/ Complainant has appended to its reply brief the Affidavit of Allan Horowitz, Manager of the Enforcement Policy Branch in the FAA's Office of the Chief Counsel. The agency attorney represents in the brief that Mr. Horowitz discusses in this affidavit the agency policy regarding consolidation of civil penalty cases. I do not find it necessary to this decision to consider this document which is not part of the record of this case, and I am denying Complainant's request for leave to submit Mr. Horowitz's affidavit. Accordingly, Respondent's Request to Strike this document is moot.

Furthermore, the Federal Courts of Appeals constitute a more appropriate forum in which to attack these rules as not consistent with the U.S. Constitution, the Administrative Procedure Act (APA), and/or the agency's enabling act. Continental I, at 6-7. Indeed, these very arguments were made in Air Transport Association of America v. Department of Transportation, et. al., 900 F.2d 369 (D.C. Cir. 1990). The court in that case did not reach the substantive challenges to the Rules of Practice, but held that they were unlawfully promulgated because the FAA did not provide an opportunity for pre-promulgation notice and comment.[5/] However, absent a specific showing that a rule led to some prejudice, I find Respondent's argument to be without merit.

3. Denial of information sought during discovery regarding personnel involved in the agency's decision to issue the complaint.

Information relating to the agency's decisionmaking process prior to the issuance of the complaint is irrelevant, and protected from discovery by the deliberative process privilege. Continental I, at 7-9. As in Continental I, Respondent has not overcome that qualified privilege by a showing that its actual

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5/ In accordance with the court's decision, cases pending at the time of that decision, including this case, were held in abeyance from April 13, 1990, until new rules were promulgated after notice and comment. See, 55 Fed. Reg. 27548 (July 3, 1990). Upon the extension of the civil penalty assessment authority on August 15, 1990 the agency resumed prosecution and disposition of pending cases, including this one.

need for discovery outweighs the harm that could result to the agency from that disclosure. Indeed, although Respondent claims that this information is necessary in order to evaluate the agency's compliance with the required separation of functions, Respondent has not even specifically alleged any violation of the APA or the agency's rules in this regard.

4. Application of the Rules of Practice to this proceeding.

Administrative proceedings are governed by the procedural regulations in force at the time the proceedings occur, not those in effect at the time of the alleged violation. Continental I, at 10-11. Thus, up until April 13, 1990, on which date all civil penalty cases pending under the FAA's Rules of Practice for civil penalty actions (14 C.F.R. §13.16 and Part 13, Subpart G) were held in abeyance pending further rulemaking[6/], the then-current rules (effective as of September 7, 1988) were properly applied to this proceeding, which was initiated on March 14, 1989.

5. Enforceability of Respondent's security plan under 14 C.F.R. §108.5.

The FAA may take enforcement action against a carrier, such as Respondent, that fails to implement the provisions of its

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6/ See, Air Transport Association of America v. Department of Transportation, et. al., 900 F.2d 369 (D.C. Cir. 1990).

security program because carriers are specifically required under section 108.5(a) to "adopt and carry out a security program that meets the requirements of section 108.7 . . . ." 14 C.F.R. §108.5(a) (emphasis added). Continental I, at 12-14. Thus, Respondent's failure to implement (i.e., "carry out") its security program (the SSP) is a violation of section 108.5(a). Id. Moreover, even if (as Respondent suggests in its appeal brief) the SSP was a substantive rule of general applicability which was required to be published in the Federal Register - which it is not - it could still be enforced against Respondent because Respondent had actual and timely notice of the SSP. 5 U.S.C. §552(a)(1). Id.

Respondent cites many of the same cases it relied on in Continental I to support its argument that the SSP cannot be enforced as if it were a regulation. Those cases are again rejected as inapposite because they involved agency manuals which, unlike the SSP in this case, were not adopted by the parties involved, and because those cases do not involve a regulation analogous to section 108.5(a), which requires Respondent to "carry out" its security plan. Continental I, at 13. Respondent's quotation from Air Line Pilots Ass'n, Int'l v. FAA, 454 F.2d 1052, 1055, n. 7 (D.C. Cir. 1971), regarding 14 C.F.R. §121.133(a) is similarly unavailing because the circumstances of that case are distinguishable from this case, and, in any event, the court's statement is merely dictum. See, Continental I, at p. 14.

Respondent also asserts that, because the FAA is limited to enforcing its regulations, Respondent should not be subject to enforcement sanctions for alleged violations of provisions of its security program which go beyond the requirements of sections 108.5 and 108.7 of the FAR. Respondent's argument is not persuasive. While it is true that section 108.7 sets forth general requirements and identifies various types of procedures which must be described in a carrier's security program, it does not follow that a carrier's program is only enforceable under section 108.5 to the extent that it meets, but does not exceed, those minimum criteria. Furthermore, Respondent's argument is based on the faulty premise that the specific provisions here at issue do not fall within the scope of any of the broad descriptions of required procedures set forth in section 108.7.

In sum, Respondent is required by section 108.5(a) to carry out the security program it adopted. Section XIII.D.1. of that program requires Respondent, acting through its employees, contractors, and agents who perform screening functions, to "detect each FAA-approved test object during each screening system operator test conducted by the FAA . . . ." See, Exhibit C-1, p. 134. Consequently, Respondent's failure to detect a test object during such a test is a violation of section 108.5(a).

6. Significance of Complainant's failure to produce an intra-agency memorandum on sanctions.

Respondent asserts that Complainant deliberately withheld a "highly relevant and material" intra-agency memorandum which discussed agency policy on what civil penalty amounts should be sought in test object cases, and that as a result, Respondent was denied the opportunity for a full hearing. Respondent's counsel did obtain a copy of the memorandum at the hearing after , the FAA employee who conducted the test in this case, alluded to the memorandum in his testimony. See Exhibit C-4. Respondent's counsel argued at the hearing that this document should have been provided in response to its discovery request for all agency guidelines used in determining the sanction, and moved to dismiss the entire proceeding based on Complainant's failure to produce the document during discovery.

The law judge denied the motion to dismiss, noting that the sanction criteria contained in the disputed memorandum were not even followed in this case. Accordingly, the law judge held that, although the document should have been produced in response to the discovery request, Respondent was not prejudiced by Complainant's failure to produce the memorandum.

Complainant's failure to produce the memorandum provides no basis for overturning the law judge's decision in this case. During pre-hearing discovery the agency attorney did provide Respondent with another intra-agency memorandum containing virtually identical sanction criteria (see Exhibit C-3).

Moreover, , who recommended the $1,000 sanction in this case, testified that in consideration of the circumstances of this test failure (e.g., the fact that the x-ray machine was apparently not properly calibrated as it should have been, and the fact that the screener appeared to be watching the screen conscientiously), he exercised his discretion to recommend a sanction less than the $10,000 civil penalty prescribed in the memorandum.

Finally, it should be noted that upon learning of the existence of the memorandum here at issue, the law judge suggested to Respondent's counsel that if he needed "relief by way of further time [they could] deal with that." In other words, Respondent's counsel could have -- but did not -- request a continuance of the hearing in order to prepare a response, if he felt it necessary. Accordingly, for all of the above reasons, it is clear that Respondent has been in no way prejudiced by Complainant's failure to produce the disputed memorandum.

7. FAA's alleged failure to follow the testing procedures described in the SSP.

Respondent argues that the agency has impermissibly applied a "double standard" in this case because it is strictly enforcing the SSP requirement that Respondent detect every FAA-approved test object, but it did not conduct the test in this case in full compliance with the procedures set out in the SSP. Specifically, Respondent asserts that the following

deviations from the requirements of the SSP are fatal to the agency's case: (1) the FAA tester who conducted this test of the x-ray screening device did not include at the same time a test of the walk-through metal detector and a physical search; (2) there is no evidence that FAA testers rotate the test objects used during tests; and, (3) the FAA actually tests screening points (locations), rather than individual screeners.

The relevant provision in the SSP reads:

Exhibit C-1, p. 134-135.

Regarding Respondent's first challenge, the law judge held, and I agree, that the above language has to be interpreted so as to permit tests to be conducted in individual segments, each involving one component of the checkpoint (i.e., metal detector, X-ray screening device, or physical search). As the agency attorney notes in his reply brief, it would make little sense to administer more than one test at a time at the same

checkpoint if -- as would have happened in this case -- the first test puts the screener on notice that an FAA test is being conducted. But even if the provision is read so as to require testing of all components of the checkpoint during an FAA test, Respondent has not alleged how it was prejudiced in this case by the FAA tester's failure to test the walk-through metal detector and physical search procedures on this occasion. Indeed, the clear purpose of the testing protocol is to provide protection to the traveling public. It is not intended to serve as a shield for the carrier in enforcement proceedings.

With regard to the rotation of test objects, Respondent points to testimony that he could not recall, without checking the records, which test object was used during prior tests. Respondent asserts that the rotation requirement, which is intended to ensure that screeners are tested on all objects, is "essentially ignored and disregarded by the FAA as the FAA engages in a program designed to test places . . . as distinguished from people . . . ." However, as the law judge noted in his initial decision, who is also the Manager of the FAA's Civil Aviation Security Field Office, testified that it is the agency's practice to rotate test objects. In any event, again, the intended beneficiary of the test protocol is not the carrier, but the public.

With regard to the alleged "requirement" that the FAA test screeners, rather than checkpoints, I see no significant difference between the two approaches, nor do I see any prejudice to Respondent in the agency's adoption of one

approach over the other.

The agency attorney is not obligated to prove, as an element of the violation in this type of case, that test objects were rotated prior to the test at issue, and that the FAA tests screeners rather than checkpoints. These issues are irrelevant to whether a violation occurred in this case. Respondent has not alleged any prejudice, nor can I perceive of any that might result from the agency's failure to rotate the test objects used with a particular screener.

8. Reasonableness of FAA's 100% detection rate policy.

Respondent argues that the FAA's policy of seeking a civil penalty for every failure to detect a test object[7/] is a standard of "perfection" which is arbitrary, capricious, and in violation of the agency's mandate to prescribe "reasonable" regulations. See, 49 U.S.C. App. §1356(a) and §1357(a). Respondent's counsel asserts that, had he been given the opportunity at the hearing, he would have shown that the FAA applies a standard less than perfection in the areas of airworthiness directives and air traffic systems errors. When

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7/ This policy is contained in an intra-agency memorandum signed by the Director of Civil Aviation Security. Exhibit C-3. Pursuant to the guidance in that memorandum, a $10,000 civil penalty is recommended for a test object failure when the detection rate for the last 20 tests at that checkpoint is less than 95%; a $1,000 civil penalty is recommended when the detection rate is better than 95%.

he proffered this at the hearing, the law judge properly ruled that the FAA's standards in other areas were not relevant to this proceeding.

The policy of seeking a civil penalty for every failure to detect a test object is not arbitrary, capricious, or unreasonable. Each such failure is evidence of a weakness in the carrier's security screening procedures, and represents a potential threat to the safety of the traveling public. Each such failure is also contrary to the SSP, which requires the carrier to "detect each FAA-approved test object," and thus constitutes a violation of 14 C.F.R. §108.5. Under sections 901 and 905 of the Federal Aviation Act (49 U.S.C. App. §1471 and §1475) the agency is authorized to assess civil penalties for any violation of the Act, or any rule regulation, or order issued thereunder. This case represents a lawful exercise of that authority.

9. Sufficiency of the evidence in support of the law judge's finding that Respondent violated 14 C.F.R. §108.5(a).

Respondent argues that Complainant did not sustain its burden of proving the alleged violation in this case. Although Respondent does not contest testimony that both he and the security screener, could see the object clearly on the screen when repeated the x-ray screening procedure immediately after the test failure, Respondent asserts that there is no conclusive evidence that the test object was discernible a few moments earlier during the test itself. Respondent notes that observed

doing his job conscientiously, and that a subsequent test revealed that the x-ray machine was not properly calibrated

Respondent's argument is unpersuasive. It is undisputed that Respondent's security screener failed to detect an FAA-approved test object during the screening system operator test conducted in this case. This failure was a violation of Section XIII.D.1. of the SSP, which in turn constitutes a violation of 14 C.F.R. §108.5(a). Accordingly, Respondent's suggestion that the object may not have been visible on the screen during the test can only be characterized as an affirmative defense. That defense is rejected.

Although there is no direct evidence that the test object was visible on the screen the first time it passed through the x-ray device, there is ample circumstantial evidence to establish that fact.[8/] testified that the test object was clearly discernible to him, and that acknowledged that he could also see it, when it was passed through the x-ray device immediately after the test failure. This raises a strong inference that the object was equally visible when it passed through the device during the test itself a few moments earlier. Although said the machine "was not acting right," and a subsequent check

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8/ A party may use circumstantial evidence to sustain its burden of proof. Continental I, at p. 20.

performed by indicated that it was not properly calibrated , this minor discrepancy clearly did not affect the machine's ability to detect the object a few moments after the test when and both saw the object on the screen.[9/] In any event, Respondent has not challenged the law judge's finding that the operation and functioning of the machine is the responsibility of Respondent, not the FAA. While improper functioning of the machine might be considered in determining the appropriate sanction - as it was in this case - it is not a complete defense to a carrier's failure to detect a test object.

In sum, Respondent has not rebutted the strong circumstantial evidence in this case which indicates that the test object was discernible on the x-ray screen the first time it passed through. Accordingly, the preponderance of the evidence supports the law judge's finding that Respondent, through its security screener, failed to detect an FAA-approved test object as required by its security plan, in violation of 14 C.F.R. §108.5(a).

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THEREFORE, in light of the foregoing, Respondent's appeal is denied, and the law judge's initial decision is affirmed.[10/] A civil penalty in the amount of $1,000 is hereby assessed.[11/]

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 22d day of August, 1990.

10/ I have also considered whether any changes made in the Rules of Practice during the pendency of this case may have affected the result in this case, and have concluded that no change in the Rules is pertinent to this case. If Respondent believes that changes in the rules would have affected the outcome of this case, Respondent may file a petition for reconsideration of this decision and order, pursuant to 14 C.F.R. §13.234. Such a petition for reconsideration must include a particularized showing of harm, citing the specific rule change (or changes) and its relevance to the challenged findings or conclusions. See, 55 Fed. Reg. 15110, 15125 (April 20, 1990). Although the filing of a petition for reconsideration does not normally stay the effectiveness of the Administrator's decision and order, under these circumstances, if Respondent files such a petition I will stay the effectiveness of this decision and order pending disposition of the petition.

11/ Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described in footnote 10 above), or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. §1486), this decision shall be considered an order assessing civil penalty. See, 55 Fed. Reg. 27574 and 27585 (1990) (to be codified at 14 C.F.R. §§13.16(b)(4) and 13.233(j)(2)).